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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1565

ASSOCIATED GAS DISTRIBUTORS,

Petitioner,

v.

FEDERAL POWER COMMISSION

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents' Oppositions to the Petitions for Certiorari contain two fatal flaws. First, respondents' vigorous defense of F.P.C. Opinion No. 639 is irrelevant. The issue presented in this Petition is not the wisdom or legality of the F.P.C.'s

basic decision (in Opinion No. 639) gradually to abolish the vintaging concept in producer ratemaking. We concede that the Commission is free, indeed it may be obliged, to overhaul its pricing policies to provide additional gas supply incentives or remove disincentives. But, the problem here is that the rate increases at bar do not serve the gas supply objectives at which the Opinion No. 639 policy was aimed. A significant increase in the rate allowed for gas production already permanently committed to the interstate market, without more, has no impact whatsoever on gas supply. Nothing in respondents' memoranda suggests how these rate orders will yield the consumer any added gas supply. It is the Commission's gross default in implementing its supply-improvement policy which invalidates the orders at bar. Judge Robinson's dissenting opinion below pinpoints the distinction between the validity of these orders and the Opinion No. 639 policy (upheld by the Fifth Circuit in the *Shell* case) in the following passage:

> The orders are clearly of the type which *Shell* referred to in its call for substantial evidence to support the absence of a vintaging component from their rate structures. I agree with the Fifth Circuit that that absence is an essential elément of the orders, and as such depended on an ample evidentiary foundation for survival. The majority position here, in treating supporting evidence as an unnecessary commodity, not only disregards *Shell's* specific ruling on the point but, more fundamentally, also ignores the Supreme Court's mandate on that score. Appendix A, AGD's Petition at 37-38 (footnotes omitted).

Second, the rationale given by the Commission for Opinion No. 639 and hence the orders here, i.e., the need to abolish price vintaging in the interest of supply improvement, has

now been thoroughly discredited by the Commission itself. This is evident from the action taken by the Commission on July 27, 1976 in its Opinion No. 770.[1]

In Opinion No. 770 the Commission has "reinterpreted" its previous renewal contracts interpretation to restore price vintaging as a basic component of producer rate regulation. Rather than seeking to abolish the concept of vintaging, the Commisison has instead found it necessary to prescribe *four* vintages of gas for ratemaking purposes in Opinion No. 770. The Commission therefore cannot justify either its renewal contracts policy or its implementation thereof in the instant orders on the grounds that it is properly moving toward the gradual abolition of vintaging. Without the "gradual abolition" policy justification, the rate orders herein fall of their own weight. The Commission's action in Opinion No. 770 deprives the "gradual abolition of vintaging" premise of its presumptive validity and exposes the instant orders as unjustified and unlawful.

Were it not for the significant cost consequences of Opinion No. 639 rate increases to consumers in the interstate markets, the Commission's policy reversal might be excusable insofar as these cases are concerned. As indicated in AGD's Petition, however, these orders all illustrative of a large number of F.P.C. orders of substantially identical character which have been held in abeyance by the court below pending the final disposition here. Together, these orders permit the collection of millions of dollars annually.

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[1] *National Rates for Jurisdictional Sales to Natural Gas Dedicated to Interstate Commerce on or After January 1, 1973, For the Period January 1, 1975, to December 31, 1976* (F.P.C., July 27, 1976). The relevant portion of this Opinion is excerpted in the August 16, 1976 Reply Memorandum filed by the Public Service Commission of the State of New York in No. 75-1556.

CONCLUSION

For these reasons, AGD submits that the Court should grant the Petition in these cases and remand them to the court below with instructions to set aside the orders in question and remand the proceedings to the Commission for further proceedings in which the producers are required either to demonstrate the availability of additional gas supply to the interstate market commensurate with the increased revenue derived from these orders or make refunds.

Respectfully submitted,

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